

1998

T.O. Richardson Inc v. Stephen W. Brockbank : Brief of Appellant

Utah Court of Appeals

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Mark E. Wilkey; Fillmore, Belliston, Iraelson; Attorney for Appellee.

Stephen G. Brockbank; Pro se.

Recommended Citation

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UTAH COURT OF APPEALS
BRIEF

Stephen W. Brockbank
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Salt Lake City, Utah 84103
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DOCKET NO. 980050-CA

Court of Appeals

~~IN THE SUPREME COURT~~
OF THE STATE OF UTAH

T.O. RICHARDSON, INC.

Plaintiff - Appellee

vs

STEPHEN W. BROCKBANK

Defendant - Appellant

Case Number 980050 -CA

Oral Argument Requested

Priority 15

BRIEF OF APPELLANT

APPEAL FROM A FINAL ORDER OF THE THIRD DISTRICT COURT, SALT
LAKE COUNTY. THE HONORABLE LESLIE A. LEWIS.

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JUN 11 1996

UTAH

COURT

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IN THE SUPREME COURT
OF THE STATE OF UTAH

T.O. RICHARDSON, INC.

Plaintiff - Appellee

vs

STEPHEN W. BROCKBANK

Defendant - Appellant

Case Number 980050

Oral Argument Requested

Priority 15

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IN THE SUPREME COURT
OF THE STATE OF UTAH

T.O. RICHARDSON, INC.

Plaintiff

vs

STEPHEN W. BROCKBANK

Defendant

Case Number 980050

Oral Argument Requested

Priority 15

JURISDICTION

Jurisdiction is conferred on this Court by Utah Code Ann. § 78-2a-3(2)(I)(1996). The final order was entered on December 30, 1997 on Civil Case 96 6910976. The Defendant filed his notice of appeal within 30 days on January 16, 1998; the docketing statement was filed on February 6, 1998. An April 29, 1998 letter from Supreme Court Deputy Clerk Babette May to the Defendant advised the Defendant that his appellant's brief is due on June 11, 1998. The notice of appeal was filed within 30 days and was therefore timely.

ISSUES PRESENTED

This appeal addresses three issues. They are:

1. The changing of a judgement issued by Superior Court in Hartford, Connecticut on December 6, 1993 ("Judgement") to include items proposed by the attorney for the Plaintiff and not in the original Judgement. As of the filing of this brief no written Final Order has been received from the Third District Court by the Defendant. However, the verbal Final Order contains the following items that are not in the Judgement: a) program documentation, b) data files, and c) updates past the date of the Judgement. The Plaintiff seeks to include these items by use of a Decision Memorandum, disregarding the errors, omissions, and direct contradictions of the Decision Memorandum with the Defendants employment contract and, in effect, seeks to unofficially reopen the case for judgement without due process of law.
2. The use of a Decision Memorandum not in evidence at the time of the original Judgement, which was proved to contain false, incorrect, and perjured statements, to substantiate revisions of the original Judgement by the Plaintiff while the use of the same Decision Memorandum was denied to the Defendant to substantiate claims by the Defendant.
3. The handcuffing of the pro se Defendant behind his back during the hearing when the final order was issued preventing the Defendant from using his notes

and thereby presenting his defense of the issues surrounding the use of the Decision Memorandum.

STATEMENT OF THE CASE

A Judgement, shown in Exhibit A, was issued against the Defendant in Superior Court, Hartford, Connecticut on December 6, 1993 without the Defendant being notified of the hearing at which witness for the Plaintiff, an attorney in the state of Connecticut, committed perjury under oath. The same judge who heard the original case was assigned to hear the appeal introduced false evidence, incorrectly reworded statements from original employment contracts, subsequently did not correct these errors, and thus found no fault with the original decision. The case focused on monies owed the Defendant and computer code to which the Plaintiff claimed access after the Plaintiff fired the Defendant and refused to pay the Defendant wages and commissions as specified in the Defendant's employment contract. These wages and commissions are now estimated to be approximately \$2,000,000.

The Plaintiff sought compliance with the Judgement in the Third District Court, Salt Lake County in hearings on October 8, 1997, December 17, 1997, and December 30, 1997. At these hearings the Third District Court ordered the Defendant to produce items not present in the original Judgement. The Defendant objected to this action of the Third District Court, citing the Third District Court's previous adherence to only the items

specifically called for in the Judgement. The Third District Court nevertheless ordered the Defendant to comply with a revised Judgement prepared by the Plaintiff and pay costs of the December 30, 1997 court session. In chambers prior to the hearing on December 30, 1997, the Defendant was handcuffed behind his back and remained constrained in that manner throughout the hearing. To present his defense of the use of the wrongful Decision Memorandum, the Defendant needed access to items brought into the courtroom, but was unable to use these items and thus present his defense. It was not known to the Defendant that such procedures would be implemented while the Defendant was expected to present his defense, and in prior hearings Third District Court did not implement such restraints.

SUMMARY OF ARGUMENT

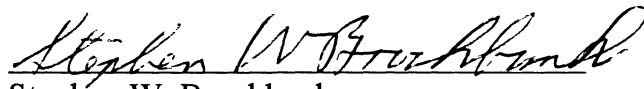
The arguments for reversal of the Final Order are that:

- A. Third District Court of Salt Lake County changed a Judgement from another state proposed by the Plaintiff's counsel without reopening the case;
- B. Third District Court of Salt Lake County admitted statements from a Decision Memorandum, introduced by the Plaintiff, such Decision Memorandum not presented at the hearing at which the original Judgement was made, to substantiate claims by the Plaintiff without reopening the case, but did not allow the Defendant to present evidence substantiating the incorrect and wrongful conclusions from the Decision Memorandum.
- C. At the request of the Defendant, the Third District Court refused to read into the record the original Judgement before making a determination that the Defendant did or did not comply with that Judgement, and;
- D. The Third District Court handcuffed the pro se Defendant behind his back, preventing the Defendant's defense of his objection to the use of the wrongful Decision Memorandum and the revised judgement based on it.

CONCLUSION

The Defendant claims that the Third District Court does not have the authority to change a Judgement without reopening the case, that evidence shown to be wrongful and incorrect may not be introduced without a fair hearing and proper cross examination, and that a pro se Defendant must be allowed to present a defense, otherwise an attorney should be appointed for him.

Respectfully submitted this 11th day of June, 1998.



Stephen W. Brockbank
Defendant - APPELLANT

CERTIFICATE OF SERVICE

On June 11, 1998 a true and correct copy of the Appellant's Brief was sent by U.S. first class mail to the attorney for the Plaintiff, Mark E. Wilkey, Fillmore, Belliston & Israelson, 3549 North University, Suite 250, Provo, UT 84604.

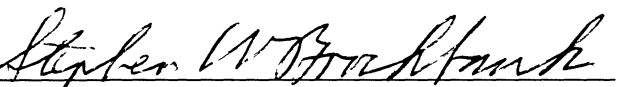
By: 
Stephen W. Brockbank, Defendant, Pro Se

Exhibit A

Original Judgement

DOCKET NO.: CV 93-0703826

T. O. RICHARDSON COMPANY, INC. : SUPERIOR COURT
2 Bridgewater Road, Farmington, CT :
06032-2256 : JUDICIAL DISTRICT OF HARTFORD/
: NEW BRITAIN AT HARTFORD
V. :
STEPHEN W. BROCKBANK : DECEMBER 6, 1993
263 G Street, Salt Lake City, Utah 84104 : MAY 30, 1996

Present: Hon. Michael R. Sheldon, Judge

JUDGMENT

This action, by Writ, verified Complaint, Affidavit, Application for Temporary Injunction, Temporary Restraining Order and Order To Show Cause, seeking damages of specific performance, or, in the alternative, money damages for breach of contract, fraud, conversion, pursuant to Conn. Gen. Stat. § 52-564, and misappropriation of trade secrets, pursuant to Conn. Gen. Stat. §35-50, et seq., came to Superior Court on January 5, 1993, and thence to December 6, 1993, when the Court found in a Hearing in Damages for the Plaintiff on all counts of the Complaint and Cross-Complaint whereby the Defendant must: 1) disclose all source codes, including uncompiled source codes, to the Plaintiff with respect to the Star Program of his Equity Investment Guide; 2) make full disclosure of any modification made to the Star Program since his termination in October 1992; 3) provide to the Plaintiff on or before December 31, 1993 any software needed to encrypt the source code if so encrypted; and 4) pay to the Plaintiff compensatory damages in the amount of \$90,530.00 and exemplary damages in the amount of \$12,197.00, and thence to May 30, 1996, when the Court granted Plaintiff's Motion For Order of Weekly Payments providing for weekly payments of \$50.00 to the Plaintiff.

Whereupon, it is adjudged that the Defendant pay to the Plaintiff \$90,530.00 compensatory damages and \$12,197.00 exemplary damages in weekly payments of \$50.00.

OFFICE OF THE CLERK
SUPERIOR COURT

AUG 18 12 55 PM '97



BY THE COURT

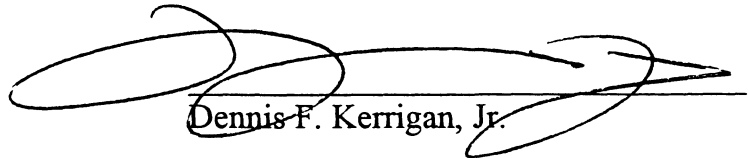
Carol D. Duggan
Clerk
AUG 18 2 17 PM '97

COPY CERTIFIED
Jacqueline Steller
Admin Asst.

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CERTIFICATION

This is to certify that a copy of the foregoing was mailed, postage prepaid, to Stephen W. Brockbank, 263 G Street, Salt Lake City, Utah 84104, on this 18th day of August, 1997.



Dennis F. Kerrigan, Jr.

Exhibit B

Revised Judgement by the Plaintiff

Stephen W. Brockbank

August 21, 1997

Honorable Leslie A. Lewis
Third District Court
240 East 400 South
Salt Lake City, Utah 44111

Dear Judge Lewis:

Yesterday, August 20, 1997, I received a letter addressed to you of August 18, 1997 from Attorney Mark E. Wilkey together with his prepared NOTICE TO SUBMIT FOR DECISION ("NOTICE") and RULING ON ORDER TO SHOW CAUSE ("RULING"). He had previously sent to me, on August 15, 1997 a proposed draft of these documents to which I responded to him about errors in his draft. He has not responded to the errors I pointed out and has submitted the above named documents to your Court.

Mr. Wilkey stated in his letter that I did not object to his proposed drafts. That is not the case. I did object and attempted to clarify the errors with Mr. Wilkey, however he has chosen to file the above nevertheless. Therefore, I would like to formally respond to Mr. Wilkey and the proposed NOTICE and RULING and am today filing the enclosed OBJECTION TO RULING ON ORDER TO SHOW CAUSE with Oral Argument Requested so that there are no mistakes in interpretation of what is to be done to resolve this matter.

Sincerely,



Stephen W. Brockbank

cc: Mark E. Wilkey
Fillmore Law Offices, Provo, Utah
enclosures

Stephen W. Brockbank
263 G Street
Salt Lake City, Utah 84103
Telephone: (801) 363-2738

IN THE THIRD JUDICIAL DISTRICT COURT FOR SALT LAKE COUNTY
STATE OF UTAH

T.O. RICHARDSON, INC.

Plaintiff

vs

STEPHEN W. BROCKBANK

Defendant

OBJECTION TO ORDER

Civil No. 96 6910976FJ

Judge Leslie A. Lewis

Oral Argument Requested

The Defendant, having appeared before the Third District Court in the State of Utah (“the Court”) on August 7, 1997 and having been advised by the Court as to the forthcoming Order to comply with a Judgement from the Superior Court in the State of Connecticut (“the Connecticut Court”) and now before the Court, desires to enter this objection to the proposed RULING ON ORDER TO SHOW CAUSE as prepared by Utah counsel for the Plaintiff based on the grounds that fraud was committed against the Defendant and the Connecticut Court. Specifically, the Defendant submits evidence that will show in this Objection that testimony under oath given by the attorney/owner of the Plaintiff, Samuel Bailey, Jr, Esq., to the Connecticut Court was false and was known to be false at the time it was given and was given with the intent to defraud the Defendant

of the Defendant's property.

The Defendant calls the Courts attention to item number five (5) of the Plaintiff's proposed ORDER ON RULING TO SHOW CAUSE, specifically Item B. which reads as follows:

"5. Defendant Brockbank is hereby ordered to comply with the injunctive portions of the Connecticut Judgement with 30 days of August 7, 1997 including, specifically, to:

A. Disclose to Richardson all source codes, including the uncompiled source codes with respect to the STAR computer program:

B. Disclose to Richardson any modification Brockbank has made with respect to the STAR program following the termination of his employment with Richardson; and

C. Disclose or provide any software or program required to unencrypt the source code for Plaintiff's STAR program, if the source code is so encrypted."

Exhibit A shows an employment agreement letter of November 27, 1991(the last in a series of three employment agreement letters dated August 20, 1990, March 19, 1991, and November 27, 1991) in which the Plaintiff, Samuel Bailey, Jr, Esq. states:

"If you are no longer employed by the Company, your future obligation to inform the Company about future changes to STAR shall apply only to the STAR programs as they exist on the date you leave the Company's employment."

The Defendant was terminated from the Plaintiff on August 19, 1992 and the Defendant filed claim for wages and commissions with the Connecticut Department of Labor in November 1992. In December 1992 the Plaintiff, Samuel Bailey, Jr, Esq. filed civil suit which the Plaintiff knew would prevent the Connecticut Department of Labor to pursue action on the complaint.

On December 6, 1993, the Plaintiff, Samuel Bailey, Jr, Esq. gave testimony in the Connecticut Court shown on page 19 of an official trial transcript of that hearing in Exhibit B (applicable statements underlined) in which Judge Michael Sheldon asks: “And you also claim the right, as long as the program, the basic program is the one that existed at the time of his departure, do you claim the right to any updates in that program?” The Plaintiff answers: “Yes”. This answer was in direct contradiction to the letter agreement written by the person giving testimony.

If it please the Court to know that this hearing was held without the Defendant having received notice thereof, and therefore was not present to defend against this obviously false statement. Numerous other false testimony was also given at that hearing, but is not directly involved in the RULING ON ORDER TO SHOW CAUSE now before the Court.

CONCLUSION

The Defendant and Plaintiff entered into the letter agreement of November 27, 1992 for the express purpose of preventing the Plaintiff from terminating the Defendant and then having rights to the Defendant’s property in perpetuity, recognizing that it would be fraudulent for the Plaintiff to acquire access to the Defendant’s intellectual property and then terminate the Defendant with rights to future modifications without future compensation. The Plaintiff then knowingly and with intent gave false testimony to the Connecticut Court with impunity because there would be no cross examination since the Defendant did not receive notice of the hearing and was not present.

PRAYER

The Defendant therefore asks the Court to modify its RULING ON ORDER TO SHOW CAUSE and set aside the Judgement until the fraud is removed from the Plaintiff's proposed Order. Specifically that Paragraph 5. B reflect the original contract and read as follows:

"5. B. Disclose to Richardson any modification made to the STAR program as it existed on the date Brockbank left the Company's employment which was on August 19, 1992."

RESPECTFULLY SUBMITTED this 21st day of August, 1997.

By: 
Stephen W. Brockbank, Defendant

CERTIFICATE OF SERVICE

On the 14th day of August, 1997 a true and correct copy of the foregoing, including Exhibits A and B was sent to Mark E. Wilkey at Filmore, Belliston & Israelsen via U.S. first class mail at 3549 N. University Ave. - Suite 250, Provo, UT 84604.

By: 
Stephen W. Brockbank, Defendant

Exhibit A

Letter Agreement by Plaintiff of November 27, 1992

T. O. Richardson Company, Inc.

Investment Advisor

November 27, 1991

Stephen W. Brockbank
Senior Vice President
T.O. Richardson Company, Inc.
11 Main Street
Farmington, CT 06032

Dear Steve:

This letter will clarify and modify our prior agreements concerning your employment. Your employment is extended to August 31, 1992 on the same terms as set forth in our agreements of August 20, 1990 and March 19, 1991. The Company will notify you 90 days in advance if it intends not to continue your draw after August 31, 1992, or for any period thereafter.

You will provide the Company with all source codes, documentation, input, limit factors and all other material information regarding the use and operation of EIG, as soon as possible and from time to time, in such form as the Company may reasonably request. In addition, you will provide the Company with full information concerning any modifications you make to EIG at any time in the future. If you are no longer employed by the Company, your obligation to inform the Company about future changes to EIG shall apply only to the EIG programs as they exist on the date you leave the Company's employment.

The Company and you will enter into a non-disclosure agreement which provides that neither you nor the Company shall disclose EIG or any other of the company's proprietary confidential information to anyone except principals of the Company and certain consultants to the Company who are bound to a comprehensive non-disclosure agreement.

Very truly yours,

T.O. RICHARDSON COMPANY, INC.


By: Samuel Bailey, Jr.
President

AGREED to this 27th day of November, 1991:


Stephen W. Brockbank

Exhibit B

Partial Transcript of Hearing of December 6, 1992

specifically

Cover Page, Page 19, and Certification of 33 Pages

A In the State of Connecticut, yes.

Q Do you claim any exclusive right to the use of this now that he's left you or just the right to use it along with him?

A No, the right to use it along with him.

Q And you claim also the right, as long as the program.
the basic program is the one that existed at the time of his
departure, do you claim the right to any updates in that
program?

A Yes.

THE COURT: Thank you. Mr. Horan, call your next witness?

MR. HORAN: I ask that this be marked Exhibit D for identification.

BY MR. HORAN:

Q Handing you Plaintiff's D, do you recognize this?

A This is a brochure which describes the component of EIG called the STAR portfolio. And STAR stands for --

Q Well rather than explaining -- do you recognize it?

A Yes, I do.

Q And do you know from what source it emanates?

A This is a brochure that is being used currently by Mr. Brockbank for marketing investment advice to clients for his current employer.

Q Using STAR?

A Using STAR.

MR. HORAN: Thank you. That's all I have, Mr. Bailey. I ask that Exhibit D be admitted?

NO. CV93-0703826S

· SUPERIOR COURT

T. D. RICHARDSON

· HARTFORD/NEW BRITAIN JD

VS.

: AT HARTFORD

STEPHEN W. BROCKBANK

: DECEMBER 6, 1993

B e f o r e:

HONORABLE MICHAEL P. SHELDON, JUDGE

A p p e a r a n c e s:

For the Plaintiff:

Brian Horan, Esq.

For the Defendant:

Not Present

: Ann C. Wolanin

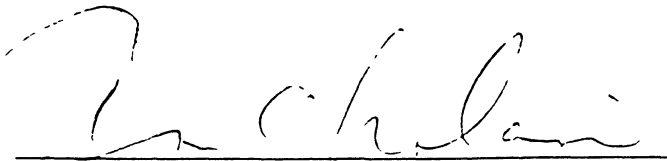
Court Monitor

NO. CV93-0703826S T. O. RICHARDSON COMPANY V. STEPHEN W.
BROCKBANK

C E R T I F I C A T I O N

I hereby certify the foregoing is transcript of the above-entitled matter heard before the Honorable Michael R. Sheldon, Judge, Superior Court for the Hartford/New Britain Judicial District on the 6th day of December, 1993 at Hartford, Connecticut.

Dated this 16th day of September, 1994 at Hartford, Connecticut.

A handwritten signature in cursive script, appearing to read "A. Wolanin", is written over a horizontal line.

Ann C. Wolanin, Court Monitor

Exhibit C

**False Evidence in the Memorandum of Decision
Superior Court, Hartford, Connecticut**

DOCKET NO. CV93-0703826

T.O. RICHARDSON COMPANY, INC.	:	SUPERIOR COURT
	:	
V.	:	JUDICIAL DISTRICT OF
	:	HARTFORD/NEW BRITAIN
STEPHEN W. BROCKBANK	:	AT HARTFORD
	:	
	:	APRIL 13, 1995

MOTION TO REVISE MEMORANDUM OF DECISION OF MARCH 23, 1995
BASED ON CONFLICTING EVIDENCE WITH CONTRACT DOCUMENTS

On March 23, 1995 the Superior Court (Sheldon, J) issued a MEMORANDUM OF DECISION ON MOTION TO REOPEN JUDGEMENT ("Memorandum 3/23/95"), shown in Exhibit I, denying the defendant's motion to reopen judgement. The defendant, Stephen W. Brockbank, submits to the Court ITEMS 1 - 9 used in the Memorandum 3/23/95 that are contrary to original evidence in the contract documents and facts before the Court and respectfully requests the Court to revise its Memorandum in view of these discovered differences upon which the decision was rendered and order the plaintiff to honor its contracted payments to the defendant specified in ITEM 9.

ITEM 1 Memorandum 3/23/95, Page 2. The Court is referring to paragraph 3 of the August 20, 1990 (Exhibit III) employment contract shown in Exhibit III. The Court reads the 8/20/90 contract as follows:

"b. the defendant would bring with him to the plaintiff the Equity Investment Guide ("EIG"), a computer software package developed and then being improved upon by the defendant that uses economic and financial information to manage individual investment portfolios." (underlines added by defendant).

Comment: As shown in Exhibit III, page 3, paragraph 3, the above underlined quote by the Court does not appear. In the 8/20/95 contract it was not stated and is not true that future development of EIG/STAR was to be done for the Plaintiff. EIG/STAR was complete on arrival and had been used to manage money since 1986 at Gardner & Preston Moss in Boston, MA and at Wright Investors' Service in Bridgeport, CT. And there were no improvements to EIG/STAR done by the defendant while in the employ of the plaintiff. Throughout this case, the plaintiff has wrongly implied that the plaintiff extended large sums of money to the defendant to develop and improve EIG\STAR. This hearsay is baseless and without proof and has been fabricated by the plaintiff. The plaintiff gave this information as testimony under oath and it has somehow been accepted by the Court as fact.

ITEM 2 Memorandum 3/23/95, Page 2. The Court is referring to paragraph 3 of the August 20, 1990 (Exhibit III) employment contract shown in Exhibit III. The Court reads the 8/20/90 contract as follows:

"b. the Plaintiff would have exclusive rights to use EIG while the Defendant was an employee of the Plaintiff, and, should the Defendant leave the Plaintiff's employ, the Plaintiff would have the right to continue to use EIG but would incur the additional obligation of making a royalty payment to the Defendant."

Comment: As shown in Exhibit III, page 3, paragraph 3, the applicable statement in the 8/20/90 contract is:

"If you leave the employment of the company involuntarily, the company may acquire exclusive rights to use EIG at a price to be agreed upon or may continue to use EIG for a royalty

payment to you of 10% of the company's net income from money under management using EIG."

The Plaintiff made no attempt to acquire EIG/STAR when the Defendant was fired on August 16, 1990 or for three months thereafter. The Plaintiff began the lawsuit only after the Defendant filed for back wages and commissions with the Connecticut Department Of Labor on November 10, 1990.

ITEM 3 Memorandum 3/23/95, Page 3. The Court is referring to page 1, paragraph 2 and page 3, item (6) of the March 19, 1991 employment contract extension shown in Exhibit IV. The Court reads the 3/19/91 contract as follows:

"a. the Defendant would continue to be responsible for providing wholesale services to the airline pilot marketing program; and

b. as set forth in the 1990 Agreement, the Defendant would continue to provide the Plaintiff with a detailed explanation of the workings of EIG."

Comment: As shown in Exhibit IV, page 1, paragraph 2, and page 3, item (6) the applicable statements in the 3/19/91 contract are:

"a. For revenue generated from the Airline Pilot program, the separate agreement for compensation and equity participation in TOR with SWB stands as specified; and

b. SWB shall continue to provide the Company with a detailed explanation of the workings of the STAR program and shall support other sales efforts within the Company for the STAR program without additional compensation." Underlines by Defendant.

It is clear in the actual quote of (a.) that the Defendant receives all of his compensation from the Airline Pilot program and clear from (b.) that the Plaintiff did not intend to compensate the Defendant in any way for sales efforts pertaining to STAR unless it

became successful. In no case was money spent for the development of STAR as the Plaintiff has claimed.

ITEM 4 Memorandum 3/23/95, Page 3. The Court is referring to paragraph 2 of the November 27, 1991 employment contract extension shown in Exhibit V. The Court reads the 11/27/91 contract as follows:

"a. the Defendant would provide the Plaintiff with all source codes, documentation, input, limit factors, and all other material information necessary to the use and generation of EIG (collectively, "Source Code and Documentation, as soon as possible and from time to time, in such form as the Plaintiff might reasonably request.

b. the Defendant would provide the Plaintiff with full information regarding any modifications he made to EIG at any time in the future; and

c. the Plaintiff and the Defendant would enter into a non-disclosure agreement whereby neither party would disclose EIG or any other of the Plaintiff's property or confidential information or trade secrets." Underlines by Defendant.

Comment: As shown in Exhibit V, paragraph 2, the 11/27/91 contract says:

" You will provide the Company with all source codes, documentation, input, limit factors and all other material information regarding the use and operation of EIG, as soon as possible and from time to time, in such form as the Company may reasonably request. In addition, you will provide the Company with full information concerning any modifications you make to EIG at any time in the future. If you are no longer employed by the Company, your obligation to inform the Company about future changes to EIG shall apply only to the EIG programs as they exist on the date you leave the Company's employment."

There is a large and material difference between being able 1) to generate the EIG program and 2) to operate the EIG program. The first difference is that in order to be able to generate the complete EIG program, the proprietary modules in EIG with the

investment formulae would have to be open to inspection, copy and change. This would violate the intellectual property rights of the Defendant and make any payment for EIG mute and unnecessary. The second difference is that to be able to generate and market STAR outside the control of the owner causes the possibility of contamination of the algorithm and a potential product liability case. Therefore, it was not granted to the Plaintiff to be able to generate the EIG program in its entirety. The Plaintiff had the ability to generate any of the data input, manipulation and sequencing operations in EIG as well as any of the accounting and reporting modules. In addition, the Plaintiff could write any investment algorithm using EIG/STAR data or data from outside sources to verify the veracity of the EIG/STAR programs. The Plaintiff decided against this alternative for cost reasons.

The 11/27/91 agreement clearly states that if the Plaintiff acquires usage of EIG, the Defendant need only supply changes up to termination of employment. This clause was specifically worded to prevent the Plaintiff from acquiring EIG, then firing the Defendant and then have access to all future modification to EIG by the Defendant without compensation. This provision of the contract nullifies any claim by the Plaintiff for subsequent EIG/STAR modifications.

ITEM 5 Memorandum 3/23/95, Page 5, paragraph 1, last sentence, the Court, referring to Exhibits III, IV and V, states that:

"On August 19, 1992, however the plaintiff terminated the defendant's employment for wilful failure to perform under the

terms of the above-described agreements."

Comment: As shown in Exhibit VI, the Plaintiff wrote to the Defendant on November 13, 1992, describing the reasons for termination on August 19, 1992, three months earlier and submitted a back dated pink slip covering two months of employment (8/20/92 to 10/15/92). The Plaintiff dated the pink slip August 19, 1992, but noted his signature as 11/13/92. This quick effort by the Plaintiff to generate a cover up for the Plaintiff's termination of the defendant without cause is supported by the Defendants November 10, 1992 Statement Of Claim For Wages filed with the Connecticut Department Of Labor.

ITEM 6 Memorandum 3/23/95, Page 11, paragraph 2, the Court states the testimony of Mr. Bailey as follows:

" As relief for the defendant's conduct, the plaintiff sought to obtain a copy of the Source Code and Documentation, as described in its agreements with the defendant, as well as money damages for all the monies it was fraudulently induced to pay the defendant to develop EIG. At no point did Mr. Bailey testify that the plaintiff owned EIG. Rather, he claimed that the plaintiff's contracts with the defendant gave it the right to use EIG and its source codes -- exclusively while he worked for the plaintiff, non-exclusively thereafter -- and to receive updates of the basic program even after the termination of the defendant's employment." Underlines by Defendant.

Comment: As shown in Exhibit IV, page 3, item (6) the applicable statement in the 3/19/91 contract is:

" SWB shall continue to provide the Company with a detailed explanation of the workings of the STAR program and shall support other sales efforts within the Company for the STAR program without additional compensation." Underlines by Defendant.

It is a clear statement that no monies are paid to the Defendant for any work related to STAR and that the Plaintiff did not intend to compensate the Defendant in any way for sales efforts pertaining to STAR. In no case, even by contractual evidence, was money spent for the development of STAR as the Plaintiff claims.

As shown in Exhibit V, paragraph 2, the 11/27/91 contract says:

" You will provide the Company with all source codes, documentation, input, limit factors and all other material information regarding the use and operation of EIG, as soon as possible and from time to time, in such form as the Company may reasonably request. In addition, you will provide the Company with full information concerning any modifications you make to EIG at any time in the future. If you are no longer employed by the Company, your obligation to inform the Company about future changes to EIG shall apply only to the EIG programs as they exist on the date you leave the Company's employment."

This statement in the non-disclosure contract clearly limits the Plaintiff's claim on EIG/STAR, should it be bone fide, to the state of EIG/STAR as it existed at the time of termination.

ITEM 7 Memorandum 3/23/95, Page 11, paragraph 2, the Court states the testimony of Ms. Messer-Russo as follows:

" Ms. Messer-Russo then testified that she had calculated the total damages which the plaintiff had sustained by reason of the defendant's total breach of his contractual obligations to be \$163,000. Those damages included \$33,277 for expenses incurred by the defendant for the further development of EIG, \$117,692 in total salary paid to the defendant, and \$12,197 in attorney's fees to prosecute this action.

Comment: As shown in Exhibit IV, page 1, paragraph 2, and page 3, item (6) the applicable statements in the 3/19/91 contract are:

"a. For revenue generated from the Airline Pilot program, the separate agreement for compensation and equity participation in TOR with SWB stands as specified; and

b. SWB shall continue to provide the Company with a detailed explanation of the workings of the STAR program and shall support other sales efforts within the Company for the STAR program without additional compensation." Underlines by Defendant.

Since the Defendant's salary was \$60,000 per year and the Defendant was in the employ of the Plaintiff for two years, it is clear in the actual quote of (a.) that the Defendant receives all of his compensation from his services to the Airline Pilot program and clear from (b.) that the Plaintiff did not intend to nor did in fact compensate the Defendant in any way for sales efforts pertaining to STAR. In no case was money spent for the development of STAR as the Plaintiff as Ms. Messer-Russo has testified. To prove this point the Court may ask Ms. Messer-Russo for time card verification of the Defendant's hourly schedule.

ITEM 8 Memorandum 3/23/95, Page 17, last sentence, the Court opinion as follows:

" Indeed the several contracts presented to the Court made it clear at all times that the plaintiff's legitimate entitlement thereunder was not only to have EIG/STAR software on their premises, available for their use without the assistance of the defendant, but to have as well all source codes and other documentation that were necessary to make wholly independent use of EIG/STAR without the defendant's assistance. Failure of the defendant to supply the plaintiff with this information has prevented the plaintiff from using EIG/STAR at any time despite its substantial payments of salary to the defendant to develop the program"

Comment:

Source Codes: The words use and using in this context to not

give the plaintiff the opportunity to modify, change or examine trade secrets of the defendant incorporated in EIG/STAR just as the use or using a word processing program like WORD or Word Perfect, a spreadsheet program like Lotus123 or MicroSoft Excel, etc does not give the person evaluating the program permission to examine the source code of those programs. This is an industry standard which expert testimony can well establish. The defendant has thirteen years experience as a systems engineer with International Business Machines Corporation (1967-1980, employee ID 911447, verifiable at IBM HQ, Armonk, New York) and has supervised the evaluation of many IBM proprietary software. Organizations performing the evaluation, just like the plaintiff, had full use of the programs and could manipulate input data, output reports and the way in which the information was processed, just like the plaintiff was able to do with EIG/STAR. They could not, however, unless they purchased the program, examine the source code of the proprietary modules and neither could the plaintiff. The obvious reason is that these codes are intellectual property; once given it can not be taken back. EIG/STAR was evaluated and used by Connecticut Mutual Insurance Company, Phoenix Mutual Insurance Company, Gardner & Preston Moss, and Wright Investors' Service. In no case was the proprietary source code revealed except for Wright Investors' Service who purchased the program after evaluating it for one year. The defendant knows for a surety the plaintiff is not an expert in this field nor is the attorney for the plaintiff as admitted in deposition of the defendant. In November 1991, the

defendant hired an expert software attorney to draft a suitable document to allow the plaintiff access to the information the plaintiff wanted. When a draft Software Licensing Agreement of November 20, 1991, Exhibit VII, from Attorney Houston P. Lowrey was presented to the plaintiff, the plaintiff dismissed the draft document and summarily fired the defendant. The plaintiff then proceeded to draft his own document that was unsuitable to permit what was needed to protect the defendant.

Substantial payments of salary to develop the program: It has already been established several times in this motion, ITEM3 and ITEM6, that the defendant's salary was solely as a result of work for the plaintiff's airline pilot program and that the defendant would promote STAR without additional compensation.

As shown in Exhibit IV, page 1, paragraph 2, and page 3, item (6) the applicable statements in the 3/19/91 contract are:

"a. For revenue generated from the Airline Pilot program, the separate agreement for compensation and equity participation in TOR with SWB stands as specified; and

b. SWB shall continue to provide the Company with a detailed explanation of the workings of the STAR program and shall support other sales efforts within the Company for the STAR program without additional compensation." Underlines by Defendant.

Since the Defendant's salary was \$60,000 per year and the Defendant was in the employ of the Plaintiff for two years, it is clear in the actual quote of (a.) that the Defendant receives all of his compensation from his services to the Airline Pilot program and clear from (b.) that the Plaintiff did not intend to nor did in

fact compensate the Defendant in any way for sales efforts pertaining to STAR. In no case was money spent for the development of STAR as the Plaintiff has testified.

ITEM 9 Memorandum 3/23/95, Page 11, last sentence, the Court restates testimony as follows:

" Ms. Messer-Russo then testified that she calculated the total damages which the plaintiff had sustained by reason of the defendant's breach of his contractual obligations to be \$163,000.

Comment:

It is actually the plaintiff who owes the defendant large ongoing sums of money. Page 1, paragraph 2. (A) (2) and page 5, paragraph 9. of the August 20, 1990 contract states:

"(2) After 12 months: 20 basis points, if the money is managed at 200 basis points, but not to exceed 10% of the company's net fee for money managed at less than 200 basis points, for as long as the money is under management and you are a registered broker.

9. This agreement may be terminated by the company at any time for cause, but you shall continue to be entitled to commissions on any money under management for so long as you are eligible to receive such commissions under federal or state securities laws. Cause shall mean (1) loss or suspension of securities licenses by you, (2) disclosure of the Sentry Formula, (3) disloyalty to the company. In addition, this agreement may be terminated at the end of the first 15 months for non-performance, which means that you shall not have produced at least \$10,000,000 of wholesale and/or retail new accounts in the first 15 months of employment." Underlines by defendant.

The defendant is a registered agent with the National Association of Securities Dealers (NASD), broker # 1715572 and holds Series 7 and 63 qualifications. The plaintiff has approximately \$60,000,000 under management as of March 1995 in the

airline pilot program and the defendant's approximate commissions are:

(\$60,000,000) (.002)

\$120,000 per year

These commissions are due and payable from the time the defendant left the employ of the plaintiff on the amounts under management at the end of years 1992, 1993 and 1994.

SUMMARY

The defendant recognizes the complexities of the contracts the plaintiff has created and the nature of the plaintiff's complaint to avoid going before the Department Of Labor or to avoid paying the defendant commissions on rightly earned share of revenues from money placed under management in the airline pilot program. The defendant asks the Court to revise its Memorandum based on the actual contract language that has been shown in ITEMS 1 - 9 in this Motion. Finally, the defendant asks the Court to order the plaintiff to fulfil its obligation to pay the defendant commissions stated in the plaintiff's contract of 8/20/95, ITEM9.

DEFENDANT

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